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No. 709

IN THE

Supreme Court of the United States

October Term, 1942

VIRGINIA ELECTRIC AND POWER COMPANY
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to
The United States Circuit Court of Appeals
For the Fourth Circuit

BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

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BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (S. R. 62)[1] is reported in 132 Fed. 2d 390. The decision and order of the National Labor Relations Board (hereinafter called the Board) is reported in 44 N.L.R.B. 404.

JURISDICTION

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A., Section 347(a)) and upon Section 10(e) and (f) of the National Labor Relations Act (hereinafter called the Act).

The decree under review of the Circuit Court of Appeals, entered on December 9, 1942 (S. R. 78), enforced an order of the Board against Virginia Electric and Power Company (hereinafter called the Company) in a proceeding instituted by the Company to set aside the Board's order, the Board's answer having requested enforcement. Certiorari was granted on March 15, 1943.

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[1]References to the Record are as follows:

"R. ....." refers to pages of the printed Transcript of Record heretofore filed in this case in this Court *sub. nom. National Labor Relations Board, Petitioner, v. Virginia Electric and Power Company* and *National Labor Relations Board, Petitioner, v. The Independent Organization of Employees of Virginia Electric and Power Company*, October Term 1941, Nos. 25 and 26.

"S. R. ....." refers to the supplemental volume filed *sub. nom. Virginia Electric and Power Company, Petitioner, v. National Labor Relations Board.*

"Supplemental Record, Vol. II, p. ....." refers to unprinted pages of the supplemental record certified on this appeal.

STATUTE INVOLVED

Pertinent provisions of the Act are set out in Appendix A hereto.

QUESTIONS PRESENTED

The petition for certiorari was limited to the following questions:

1. In the circumstances of this case, may the Board, in ordering disestablishment of an unaffiliated union (The Independent Organization of Employees of the Virginia Electric & Power Company, herein called I.O.E.) require the Company to reimburse employees for all dues deducted from wages and paid to the I.O.E. pursuant to individual assignments by employees and the provisions of a union agreement with the I.O.E.?

2. To the extent, if any, that may be pertinent to the review of 1. above, was there adequate evidence and basis in law to support the Board's finding of "dominating and interfering with the formation and administration" of the I.O.E. and "contributing support to it"?

STATEMENT OF THE CASE

1. How the Case Comes Up

On a complaint dated May 7, 1938 (R. 9) alleging violations of Section 8 (1-3) of the Act by the Company, the Board held hearings in May and June, 1938 (R. 27). A decision and order sustaining, in greater part, the allegations of the complaint were issued on February 27, 1940 (R. 953), ordering, among other things, that the Company disestablish the I.O.E. as collective bargaining agent of its

employees (R. 979) and reimburse employees for all dues deducted from their wages and paid to the I.O.E. (R. 980).

The Circuit Court of Appeals for the Fourth Circuit held on November 12, 1940 (R. 1006, reported in 115 F. 2d 414) that "there is nothing to show that the employees' association does not represent the free choice of the employees, that the company at any time dominated or in any way interfered with the employees in setting it up or that the company exercises over it any control or domination whatsoever" (R. 1008), in other words that the Board's findings were not supported by evidence and were unsupported in law. That court accordingly entered a decree setting aside the Board's order in its entirety (R. 1019).

On certiorari, this Court delivered an opinion on December 22, 1941 (S.R. 1, reported in 314 U. S. 469), the intent of which was a matter of debate before the Board and before the court below. In the view of the Company, the opinion held that the Board had proceeded on a misconception of law in believing that the words of a bulletin of April 26, 1937 and a speech of May 24, 1937 (both of which are commented on below) were in themselves a violation of the Act, and that the Board's other conclusions seemed essentially dependent on its findings with respect to that bulletin and speech, so that there was, in effect, no administrative determination, which was of course prerequisite to any judicial review. In the view later taken by the court below, the opinion held, or at least implied, that the evidence was sufficient to sustain findings of domination if made properly. In any event the cause was remanded to the court below with directions to remand to the Board for a redetermination of the issues in the light of the opinion.

On the same record, without any additional evidence, the Board promulgated a new decision and order dated September 24, 1942 (S. R. 13, reported in 44 N.L.R.B. 404), of

similar effect, for present purposes, with its 1940 decision and order.

The court below felt, contrary to the rule that in such cases review begins again *de novo*,[2] that the reversal of its former decree by this Court "precludes another holding that the identical evidence is insufficient" (S. R. 63) for the ruling of this Court had made it the law of the case that a disestablishment order could be entered by the Board on the original record, and that, apart from that doctrine, there was a "clear intimation" in this Court's opinion that the evidence was sufficient for that purpose (S. R. 70). On those two grounds alone, without any consideration of the merits,[3] the court below felt constrained to order enforcement of the Board's order. In doing so, a majority of the Court concluded that the dues reimbursement requirement was within the power of the Board (S. R. 71-76), Soper, C. J., dissenting (S. R. 76).

2. Outline of the Facts

The Board's 1940 decision rested on 8 episodes, all of which are relied on again in its 1942 decision, either unchanged or with some refinements of presentation. The facts may be most briefly outlined by enumeration of those episodes. For convenience, references are added to each of the two decisions of the Board:

(1) *Background.*—After a strike in 1922, no labor organization existed. In 1933 the Company's president spoke about the National Industrial Recovery Act, saying that the employees could form or join labor organizations but that

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[2] *Ford Motor Co.* v. *N. L. R. B.*, 1939, 305 U. S. 364, 373-4, 376; *Securities and Exchange Commission* v. *Chenery Corporation*, 1943, 317 U. S. ....., 87 L. ed. 411.

[3] Though with a polite bow to the reasonableness, as well as the authority, of this Court's opinion (S. R. 71).

he believed it unnecessary.[4] The Company continued the employment of Walters to gather news on all matters including labor matters, but no report on the latter was made after the enactment of the Act nor was his existence known to the men.[5] [In fact, Walters became fatally ill before any of the events here in question (*i.e.* in March, 1937), never got out of bed again, was discharged near the end of May and died soon afterwards.[6]]

(2) *Bishop.*—In 1936 Bishop, the Superintendent of the Company's Norfolk transportation department, questioned some employees about organizational matters in connection with prolonged parties at a bootleg store.[7]

(3) *Edwards.*—A minor supervisor, Edwards, observed employees entering a union meeting and expressed opposition to national unions.[8]

(4) *Bulletin.*—On April 26, 1937 the Company posted throughout its properties a bulletin (S. R. 24-25) proclaiming freedom of organizational choice, stating that it was not necessary to join any organization and that if any employees wished to discuss anything with any officials, the latter would be glad to meet them.[9] The Board construed this as an appeal not to organize.

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[4]Unchanged; for 1940 Decision see R. 959; for 1942 Decision see S. R. 45 and 61.

[5]Refined; for 1940 Decision see R. 960; and see Board's 1940 Brief, pp. 20-21; for the Board's 1942 Decision see S. R. 22-23, 35-36 and 41-42. One employee heard of the employment, but after its termination (cf. R. 29 and R. 76).

[6]R. 56-59, 326-327, 331-334, 371-372, 399-402, 444-462.

[7]Unchanged; 1940 Decision, R. 959-961; 1942 Decision S. R. 23-24, and 37.

[8]Refined, with one new incident of similar character added; 1940 Decision, R. 960; 1942 Decision, S. R. 33-34 and 40.

[9]Refined; 1940 Decision, R. 961-2; 1942 Decision, S. R. 24-25, 37 and 42-43.

(5) *Speech.*—On May 24, 1937 Company officials read an address (S. R. 27-28) to sample audiences informing the men that requests had been received from scattered fractional groups of employees, stating that it was not practical to negotiate with such groups, quoting Section 7 of the Act on the organizational liberty of the men and announcing that the Company was willing "to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make."[10] The Board construed this as an appeal to organize an unaffiliated union. It is the main basis of the Board's action.

(6) *I.O.E. calendar.*—The sample audiences on May 24 reported the address to their fellows and before June 1 large majorities in each group had voted for the creation of an unaffiliated independent union. A lawyer was retained, he prepared organization papers and an organization was formally instituted on June 15, 1937. In a membership campaign during the next two weeks 90% of the employees joined. Officers were elected on July 2-12 and bargaining demands were formulated at a convention on July 17-19. These demands were immediately served on the Company. Negotiations were begun on July 30th and continued aggressively for three days (July 30-August 1). Thereafter an agreement was signed under which the I.O.E. became the exclusive bargaining agent for all non-supervisory employees of the Company. This discussion is unchanged[11] except that:

> (a) the discussion of the use of Company property that was made to some extent by I.O.E. organizers before June 15 is refined;[12]

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[10]Unchanged except that part of the Board's decision is refined: 1940 Decision, R. 962-4; 1942 Decision, S. R. 27-28, 37-39 and 44-46.

[11]1940 Decision, R. 965-7; 1942 Decision, S. R. 29-33.

[12]1940 Decision, R. 965-6, 1942 Decision, S. R. 29, 40 and 46-47.

(b) the discussion of the employee list supplied on the request of the I.O.E. organizers by the Company at cost[13] is refined (S.R. 30 and 40); and

(c) the discussion of the I.O.E. contract, principally the alleged speed of the Company's assent, but including also the provisions for closed shop and check-off, is refined.[14]

(7) *First payment of dues.*—Two weeks after executing the I.O.E. contract the Company paid the I.O.E. the amount of the required check-off, then overdue under the contract, before completing the mechanical task of entering that wage deduction in all employee accounts.[15]

(8) *Discharges.*—The Board's 1940 Decision found that four employees (Mann, Elliott, Harrell and Staunton) had been discriminatorily discharged; the 1942 Decision holds that one of these (Harrell) was not discriminatorily discharged and that reinstatement should not be required for another (Elliott). Otherwise the discussion of the discharges is unchanged except that the discharge of Mann (an accident-prone trolley operator who was discharged for impertinence) is given greater emphasis and is used to color the whole issue of domination and interference.[16]

While, as above indicated, some of the above material has been rewoven, the yarn is the same, the colors are the same and the resulting pattern is indistinguishable in substance from that presented in the Board's 1940 decision.[17]

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[13]Heretofore contained only in the briefs of Board counsel, e. g., 1941 Brief, p. 35.

[14]1940 Decision, R. 967; 1942 Decision, S. R. 32 and 41.

[15]Unchanged; 1940 Decision, R. 967; 1942 Decision, S. R. 33.

[16]1940 Decision, R. 969-75; 1942 Decision, S. R. 49-53, and 56-58.

[17]The length, however, was increased, as the court below pointed out, from 2 pages to 14 (of the record before it) for the statement of the conclusions as to the I.O.E. (S. R. 67).

In the present decision as in 1940 the dominating events on which the whole case turns are the two executive communications on organizational matters, the bulletin of April 26 and the speech of May 24. The other material is merely incidental to those communications, or is a collection of random conduct by subordinate supervisors which could not have had any general influence.

The only new material dealt with in the present decision, and not in the decision of 1940, relates to one minor supervisor in one of the three departments of the Company's business in one of the many communities served by it (Bishop, transportation department, Norfolk, Virginia). Bishop is now found, in conversation with one employee, to have expressed opposition to affiliated unions and suggested the organization of an unaffiliated union (S.R. 25-26), but the only effect was a petition for a wage increase (S.R. 26, and R. 65-66 and 96). Bishop is now also found to have tried to influence another employee, leading a separate movement in the Norfolk transportation department, to combine with the incipient I.O.E. (S.R. 34-35), but when some contemporary claim to that effect was made in the public press, it was at once denied by a bulletin posted throughout the properties over the president's signature, the bulletin concluding with this basic statement of policy:

> "Employees of Virginia Electric and Power Company have a right to self-organization, to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing, and the Company has not sought and does not seek to dominate or interfere with employees in the exercise of any of their rights, individually or collectively." (R. 861).

As it later appeared, this bulletin (of June 24, 1937) was at the very height of the competitive drive for union membership.

The relative triviality of these two new incidents shows, quite as well as the industry of the Board in elaborating its conclusions with respect to the April 26 bulletin and the May 24 address, that those two communications remain the heart of the Board's case. The Board's additions and refinements are designed to disclose some new semblance of employer attitude that could not be derived from the words themselves. With respect to those words, it will be remembered, this Court said:

> "If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the Company" (S. R. 9; 314 U. S. at 479).

While the case was pending on review in the court below, the National War Labor Board entered a directive order of November 3, 1942 restraining the Company from entering into "any contractual relationship" with the I.O.E. "until such time as the collective bargaining agent is chosen under the law,"[18] thus preventing consummation of a wage increase the negotiation of which had just been substantially concluded by the I.O.E.[19] On December 9, 1942 the opinion of the court below was entered (S.R. 62), enforcing the Board's order without review of the merits. On December 14, 1942 the Board entered an order at the instance of a complaining union in another proceeding[20] finding that the street car and bus operators (nearly half of the employees of the Company and a similar proportion of the members of the

[18]Certified Supplemental Record Vol. II, p. 13 (at pp. 13 and 96).

[19]Certified Supplemental Record Vol. II, p. 13 (at pp. 6-9).

[20]In the Matter of Virginia Electric & Power Company and Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, A. F. of L., 45 N.L.R.B. No. 183.

I.O.E.) constituted a separate bargaining unit and directing that an election be held in such unit to determine its collective bargaining representative. On the same day the I.O.E. notified the Company that it had decided to dissolve, without asking for a review of the decree below.[21]

On December 18, 1942 the Company posted a bulletin quoting the Board's order and the order of the court below, announcing compliance therewith (except the dues reimbursement requirement), disestablishing the I.O.E. and announcing that "all employees are free to become or remain members of Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, or International Brotherhood of Electrical Workers, and the Company will not discriminate against any employee because of membership or activity in such organizations."[22]

3. Summary

The main basis for the finding of domination is the bulletin of April 26, 1937 and the speech of May 24, 1937, other incidents being relied on chiefly as a setting for those communications. There is no evidence or finding, nor has there ever been any claim, of domination or interference except during the period of choice (R. 1012-13); specifically, there is no evidence or finding, nor has there ever been any claim, of any domination, interference or support after the execution of the I.O.E. contract on August 5, 1937, except performance by the Company of the closed shop and check-off clauses. So the I.O.E. was not a glove for the employer's hand but must be taken, from that time on, as the free agent

[21]Certified Supplemental Record Vol. II, p. 53.

[22]Supplemental Record, Vol. II, pp. 54, 58-62. This bulletin is quoted at greater length below.

of the men themselves, managed independently by them for the accomplishment of their own wishes as they viewed them.

Finally, no court has held that the I.O.E. was unlawfully created. The opinion of this Court, which was considered below to preclude repetition of its original holding that the evidence did not support a finding of domination, said:

> "We do not mean to intimate any views of our own as to whether the Independent [I.O.E.] was *dominated or* suggest to the Board what its conclusion should be when it reconsiders the case." (S. R. 32).

The I.O.E. succumbed, it seems fairly plain, not to the decree below but to its inability to consummate the contract it had negotiated and to the splitting of its electorate into two bargaining units, all of which made it seem that the I.O.E. could no longer best serve the interest of the men. The dissolution of the I.O.E. was, of course, the reason why review was not sought of the decree below so far as it enforced the disestablishment order.

SUMMARY OF ARGUMENT

1. *The Controlling Standards.*—The only relevant power of the Board is "to take such affirmative action . . . as will effectuate the policies of this Act", namely, to encourage collective bargaining and protect full freedom of self-organization (Section 10(c) and Section 1). Restoration of the *status quo* is a valid criterion of power only if, and to the extent that, it serves to "effectuate the policies of this Act". The Act is concerned only with a public wrong; private losses have no significance except in so far as their persistence may thwart the free exercise of the right of collective bargaining and self-organization and their redress may restore free exercise of that right. *National Licorice Company* v. *N.L. R.B.*, 1940, 309 U. S. 350 [Section 2 below].

2. *Public Wrong.*—Disestablishment of the I.O.E. and proclamation again of complete freedom of organizational choice has fully terminated any public wrong and fully restored complete freedom of exercise of the statutory rights [Section 3(a) below]. The public wrong, if any, of this employer is now ended and its repetition is forbidden by injunction; the only possible effect of dues reimbursement would be to deter other employers from agreeing to a checkoff in other cases because of the punishment imposed on this employer, but that is no sufficient basis for power on the part of the Board. *Consolidated Edison Company* v. *N.L.R.B.*, 1938, 305 U. S. 197, 236; *Republic Steel Corp.* v. *N.L.R.B.*, 1940, 311 U. S. 7, 11-13 [Section 3(b) below]. With respect to the employees, any public wrong in respect of them by this employer is now fully terminated and its repetition forbidden by injunction; so far as they, or any other employees, may be concerned with other employers, knowledge that reimbursement of dues will follow disestablishment of any dominated union can not contribute to independence when the choice of joining, or remaining a member, of any particular union is made, but would indeed tend to the opposite effect, being in this respect sharply distinguishable from knowledge of immunity from loss of job and pay. These circumstances being decisive as to the public wrong, it is immaterial what, if any, private injury may have been sustained [Section 3(c) below].

3. *Private Wrong.*—The checkoff has no causative relation to any private injury that may have been sustained [Section 4(a)(1) below]. Moreover, there is no basis for any finding that any private injury has been sustained. There is no basis for any finding that the checkoff was involuntary as to any individual, for both the checkoff and the closed shop were forced upon the Company by representatives of 90% of the employees as a price of industrial peace; the

Company made deductions from wages only in accordance with assignments executed by individual employees; there is no evidence that any employee signed his assignment unwillingly or sought in any way to terminate it; there is no evidence or finding or contention that the I.O.E., from the moment of its organization, was managed in any way other than by the men themselves in the independent realization of their own wishes; and the men were wholly free to eliminate the closed shop or the checkoff or reduce or eliminate the dues [Section 4(a)(2) below]. But even if any payment of dues was involuntary, nevertheless such payment was offset by the benefit received, for whatever public detriment the continuation of a dominated union may involve, it does not *ipso facto* impose any private injury on its members; but indeed notable advantages were obtained by the I.O.E. and it is wholly impossible to find that the employees would have benefited in any greater degree by any other possible state of affairs [Section 4(a)(3) below]. The closed shop clause, which is the real target of the Board's objection, does not in itself involve any determinable injury to any individual, for coercion by employer preference could be quite as effective in the absence of any formal proclamation [Section 4(b)(1) below]. As in the case of the checkoff, it is wholly indeterminable that any employee became or remained a member of the I.O.E. unwillingly; indeed the closed shop clause was forced on the Company by the employees; there is no evidence that any employee wished or sought to resign from the I.O.E.: the employees had the entire power of decision whether to continue, or to eliminate, the closed shop clause; and it is, in result, impossible to find that the employees would have gained by any other possible state of affairs [Section 4(b)(2)]. So neither membership nor payment of dues was involuntary or unprofitable; reimbursement of dues is merely a penalty because of a past violation of the

Act and in itself powerless to remedy the evil or even to contribute to that end [Section 4(c) below].

4. *Causation.*—The unchallenged freedom of the employees in the management of the I.O.E. according to their own wishes constitutes a supervening cause which excludes any causative responsibility of the employer for the collection or use of dues [Section 5 below].

5. *Finding as to Domination.*—Dues reimbursement is not supportable on the basis of the disestablishment order for that order rests at bottom only on the words of the bulletin of April 26 and the address of May 24; those communications do not offend the Act; and the other events provide no reasonable basis for any finding of management position contrary to the plain meaning of the words themselves [Section 6 below].

6. *Conclusion.*—The decree below should therefore be reversed to the extent that it enforces the dues reimbursement requirement (Section 2(e) of the Board's order, S. R. 61).

ARGUMENT

1. Introduction

Requirements of Board orders for reimbursement of dues collected by means of a checkoff have been considered, aside from the case at bar, in 11 cases by 5 Circuit Courts of Appeal. In all such cases the dues reimbursement requirement was set aside as being beyond the power of the Board. Out of 22 Judges who sat in these various cases, only one dissented.

A summary of the reasoning in such cases is provided in Appendix B hereto. Such reasoning is utilized in the following argument, but the argument is organized as an independent discussion of the applicable principles.

2. The Controlling Standards

The Board has the power to require any persons guilty of an unfair labor practice "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act" (Section 10(c); 29 U.S.C.A. Sec. 160(c)). That is the only relevant grant of power to the Board, so the order in question must be justified under that grant if at all. The determining phrase, of course, is "to take such affirmative action . . . as will effectuate the policies of this Act".

The policies of the Act are declared in Section 1, 29 U. S. C. A. Sec. 151, as to protect commerce:

> ". . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

This simple purpose of the Act has been summarized in slightly differing terms by this Court:

> "The remedial purposes of the Act are quite clear. It is aimed, as the Act says (Section 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives." (*Republic Steel Corp.* v. *N.L.R.B.*, 1940, 311 U. S. 7, 10.)

> "We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial

> peace to remove obstructions to the free flow of commerce as defined in the Act." (*N.L.R.B.* v. *Fansteel Corp.*, 1939, 306 U. S. 240, 257.)

So a reimbursement order is within the power of the Board only if it will effectuate those policies. That is the decisive standard. Surely it should be kept close at hand so that at the crisis of decision the course may be guided by it rather than by any of the verbal formulae that have been found useful as practical aids to identifying it in some situations.

That caveat is particularly applicable to the formula of "restoring the *status quo*," which was relied on by a majority of the court below (S. R. 75). That formula was developed by the Board as a rule of thumb for remedying unfair labor practices. But the Act says nothing about the restoration of the *status quo;* it talks only of effectuation of the policies of the Act. Restoration of the *status quo* may or may not be a valid criterion, but if so, it is so only because it will, in the circumstances of a particular case, effectuate the policies of the Act, for that alone is the power conferred by the Congress.

In the application of this decisive standard of effectuating the policies of the Act, it also seems important to bear in mind that the standard, like the Act at large, is not concerned with private wrongs but only with the public wrong of interference with the free exercise of the right of organization.[23] Private losses have no significance except in so far as their persistence may thwart the free exercise of the right of collective bargaining and self-organization and their redress may restore free exercise of that right.

Of course, only the question of power is before this Court. Within the limits of its power, the Board has discretion to

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[23]74th Congress, 1st Session, House Report No. 972, May 21, 1935, p. 21, House Report No. 1147, June 10, 1935, p. 24; *National Licorice Co.* v. *N.L.R.B.*, 1940, 309 U. S. 350.

choose the appropriate remedy and no review of that discretion is sought here.

3. Public Wrong

(a) Introduction

The I.O.E. is now dead. Pursuant to the decree below (S. R. 78), the I.O.E. was dissolved by its membership and disestablished by the Company. A bulletin, published by the Company throughout its properties on December 18, 1942, quoted the order of the Board and the order of the Court below and then announced:

> "In compliance with said Orders the Company:
>
> "(1) States that it will not engage in the conduct from which it has been ordered to cease and desist in paragraphs (1) (a), (b), (c) and (d) in the first of said Orders.
>
> "(2) Withdraws all recognition from The Independent Organization of Employees of Virginia Electric and Power Company as the representative of any of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of employment; completely disestablishes The Independent Organization of Employees of Virginia Electric and Power Company as such representative; and states that it will not bargain collectively with The Independent Organization of Employees of Virginia Electric and Power Company in the future or have any other dealings with it as a representative of any employees of the Company.
>
> . . . . .
>
> "(4) States that all employees are free to become or remain members of Transport Workers Union of America, Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America,

> or International Brotherhood of Electrical Workers, and the Company will not discriminate against any employee because of membership or activity in such organizations."[24]

So complete freedom of bargaining opportunity is now restored and fully secured. That is the statutory objective and it is now realized in full. What possible addition to its completeness could be made through reimbursement of dues? Most of the Circuit Courts of Appeal which have considered such orders have taken the view that dues reimbursement could add nothing to the realization of the statutory policies, for these had been fully secured by similar disestablishments. It may be helpful, however, to examine the practical situation in somewhat closer detail.

(b) Effect on the Employer

A required action in such cases may have an effect upon "the payor and payee, one or both" (*Republic Steel Corp.* v. *N.L.R.B.*, 1940, 311 U. S. 7, 14, diss.)

So far as the employer is concerned, his wrong, if any there was, is now ended. A court injunction (S. R. 78) prevents any future repetition. That prevention cannot be further assured by any penalty. So far as other employers are concerned, punishment to this one as an example might conceivably deter them from agreeing to any check-off in other situations. But, if so, they would be deterred from making such an agreement with any union and not merely with unaffiliated unions, for it is not only unaffiliated unions that the Board may find to have been dominated (e. g., *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U. S. 197), and forecasting the result of such proceedings may require "omniscience frequently not given to members of the legal

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[24]Supplemental Record Vol. II, pp. 54 and 58-62.

profession" (*Phelps Dodge Co.* v. *N.L.R.B.*, 1941, 313 U. S. 177, 207, diss.). It is not clear that this would in any way effectuate the policies of the Act. The check-off, like the closed shop, is an advantage which all unions seek and which is certainly lawful in respect of undominated unions. But even if the Court should consider that this would effectuate the policies of the Act, or consider that the Board's inferential judgment to that effect should be accepted, nevertheless that could be true only in the sense that punishment to one now may deter others in the future. There is nothing, however, in the Congressional history of the Act to indicate any power on the part of the Board to achieve the beneficent purposes of the Act and promote industrial peace by hanging heads on a tower wall. This Court has repeatedly held that deterrence by punishment is no basis for power on the part of the Board. Thus:

> "The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." (*Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U. S. 197, 236.)
>
> ". . . it is not enough to justify the Board's requirement to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." (*Republic Steel Corp.* v. *N.L.R.B.*, 1940, 311 U. S. 5, 12.)
>
> . . . "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act." (id. 11).

Dues reimbursement will therefore not effectuate the policies of the Act so far as this employer is concerned, or any other employer.

(c) Effect on the Employee

With respect to the employee, his liberty in respect of organizational choice is now restored. It is as complete as it can be. It can not be made any more complete by any money award. So far as the past is concerned, no order can undo the lapse of time or re-create in the past a liberty that was then denied, nor can any device, whether a money award or otherwise, have any tendency to that end. So far as the future is concerned, each of these employees has, with respect to this employer, the benefit of the injunction (S. R. 78), which is the strongest assurance Government can offer. These employees have, with respect to any other employers with whom they might work, and all other employees have, the knowledge that any dominated union will be struck down. Their independence at the time of choice or thereafter can not be increased by knowing that in such event there would be a refund of any dues that should have been paid to the dominated union; on the contrary, if such knowledge were capable of having any effect, it would tend to make them more *amenable* to membership in dominated unions rather than less so. In this respect, it is to be sharply contrasted with back pay, for the certainty of immunity from loss of job and pay on account of union preference is essential to independence.

This point was well put in an editorial comment in 41 Columbia Law Review (1941) pp. 748-9:

> "Aside from this possible ground for upholding the action of the Board, it would appear that an order which is solely designed to rectify a past wrong is not au-

thorized. The Supreme Court requires affirmative action to be 'remedial in nature.'[9] In its effort to conform to this test, the Board has adopted the view that the way to remedy unfair labor practices is, wherever possible, 'to restore the status quo.'[10] It would seem, however, that mere restoration of the status quo does not obviate the necessity of showing that an order also serves to encourage collective bargaining or to protect the employees' freedom of association. The main category of orders said to 'restore the status quo' are those which provide for the payment of back pay to employees reinstated after a discriminatory discharge; the Board has argued that the action taken in the principal case is closely analogous to such an order.[11] But the back pay order, in addition to being specifically authorized by the Act,[12] plainly furthers its declared objectives. By assuring the employee that reimbursement will be forthcoming should he suffer loss as a consequence of em-

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[9]An action is remedial when the power is 'exercised in aid of the Board's authority to restrain violations and to remove and avoid the consequences of violation where those consequences are of the kind to thwart the purposes of the act.' Consolidated Edison Co. v. N.L.R.B., 305 U. S. 197, 236 (1938); N.L.R.B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 257 (1939).

[10]Heller Bros. Co. of Newcomerstown, 7 N.L.R.B. 646, 656 (1938) quoted in Third Ann. Rep., N.L.R.B. (1939) 199, n. 85; Colorado Milling & Elevator Co., 11 N.L.R.B. 66, 75 (1939); Foster Bros. Mfg. Co., Inc., 1 N.L.R.B., 880, 889 (1936). See also N.L.R.B. v. Remington Rand, Inc., 94 F. (2d) 862, 872 (C.C.A. 2d, 1938).

[11]N.L.R.B. v. Greenebaum Tanning Co., 110 F. (2d) 984, 989 (C.C.A. 7th, 1940).

[12]The Board is expressly empowered to take 'affirmative action, including reinstatement with or without back pay.' Section 10(c), 29 U.S.C. §160(c) (Supp. 1938). The circuit courts are split as to whether the Board may order back pay *without* reinstatement. Compare Phelps Dodge Corp. v. N.L.R.B., 113 F. (2d) 202 (C.C.A. 2d, 1940), *cert. granted*, 3 C.C.H. Labor Law Serv. Paragraph 51013 (1940) and Mooresville Cotton Mills v. N.L.R.B., 94 F. (2d) 61 (C.C.A. 4th, 1938) with N.L.R.B. v. Carlisle Lumber Co., 99 F. (2d) 533, 537 (C.C.A. 9th, 1938).

ployer hostility, it encourages independent union activity."[13]

"It is less apparent, on the other hand, how the order rejected in the instant case could be said to perform a comparable function. When an employee is urged to join an employer-dominated union, the possibility, even were it known to him, of later reimbursement for any dues paid would do nothing to foster independence."

It is clear, therefore, that a reimbursement order can not effectuate the policies of the Act so far as these employees are concerned, or any other employees.

Since reimbursement of dues can not subserve the public purposes envisaged by the Act, there is no occasion to inquire whether the check-off worked any injury to the employees individually. Any such injury, if it existed, would be immaterial from the point of view of the Act and incompetent to sustain the reimbursement order. As this Court has said:

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. *Amalgamated Utility Workers* v. *Consolidated Edison Co., ante,* p. 261; H. Rept. No. 1147, 74th Cong., 1st Sess., Committee on Labor, p. 24; cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19. It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining

[13] (1940) 40 Columbia Law Rev. 1275. See also Note (1939) 48 Yale L. J. 1265. Under this view of the case, restoration of the status quo is merely the result of the order and not its rationale."

and by protecting the 'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . .' §1. The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§7, 8, are practices tending to thwart the declared policy of the Act. To that end the Board is authorized to order the employer to desist from such practices, and by §10(c) it is given authority to take such affirmative remedial action as will effectuate the policies of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra.*

"In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." (*National Licorice Co.* v. *N.L.R.B.*, 1940, 309 U. S. 350, 362-63.)

(d) Conclusion

The Board may not escape the particularity of the above analysis by using this very nomenclature of a public wrong. A wrong, though public, must still be concrete; and any remedy must be actually remedial. The wrong here, if any was committed, was a deprivation during a past period of time of full freedom of organization on the part of the employees. No such wrong can be remedied in money unless there is either a legislative fixing of a penalty or some basis for determining the amount. Here the Congress has not fixed any penalty and there is no basis for measuring the wrong in terms of money, for money has no relationship to the wrong.

The Board being given power only to terminate a public wrong and remove its consequences where they are "of a kind to thwart the purposes of the Act", it follows that

there is no power to require dues reimbursement, both because there are no remaining consequences "of a kind to thwart the purposes of the Act" and because dues reimbursement would in itself have no tendency to effectuate the policies of the Act. It is unnecessary, therefore, to inquire into any question of private injury. But since a claim of private injury was presented forcibly by the Board in the Court below and reflected in the opinion, an examination of that claim may now be made. That will indeed offer an advantage by reflecting additional light on the question of public wrong itself.

4. Private Wrong

(a) The Checkoff

Though not so found in terms by the Board, the checkoff was urged by Board counsel in the court below as an unfair labor practice in itself, in that the I.O.E. was a dominated union. There is, of course, nothing in the Act that proscribes a checkoff as such or that attaches to it any special consequence. A checkoff is merely one of the countless possible ways in which aid may be given. The question is again whether a public wrong has been committed by interfering with the free exercise of the right to self-organization. To an independent union, the checkoff is lawful; but to a dominated union the checkoff is unlawful in that it gives help to the union. The extent of the actual help is not measurable in money, for it may range from the mere convenience of a collection service to strong moral support. But *non constat* that this involves any actual injury to any individual, for a number of reasons:

(1) Each individual would be under exactly the same constraint, and in fact a good deal more inconvenience, if there were no checkoff at all, so long as there is a closed

shop. The coercion is the threat, solemnized usually in an agreement between the employer and the union, of discharge for non-membership in the union. Since the union rules normally require the payment of some dues, that threat requires the payment of the stipulated dues. But it is no injury to any individual that the dues, payment of which is required, are required to be paid in any particular way, whether solely by individual remittances, or optionally by individual remittances or by company checkoff or solely by company checkoff. The reduction from individual receipts is the same in all three methods. The real target of the Board's complaint is therefore manifestly the closed shop clause; the checkoff has no causative relation to any possible injury.

(2) There is no evidence, nor is there any finding, that any individual signed any assignment of wages for the checkoff, or permitted any deduction for the checkoff, or made any direct payment of dues, unwillingly. On the contrary:

(i) Neither the checkoff nor the closed shop was an invention of the Company in this case or imposed by it on unwilling employees to lock the chains around them. Both the checkoff and the closed shop were invented by the I.O.E. and forced upon the Company as a price of industrial peace. The checkoff was agreed to by the Company in the first day of the negotiations (R. 260, 265 and 875-6). There was no strong Company objection, for deductions were already made for the convenience of the men on their written orders to pay third persons (R. 299-300). The form of the agreement was an undertaking by the Company to honor individual assignments, to which was added, at the Company's insistence, an express proviso that any such as-

signment might be revoked at any time[25] (R. 876). This would of course have made the operation of the checkoff entirely optional with each individual had it not been for the adoption on the following day of the closed shop. The closed shop clause had been the first substantive proposal of the I.O.E. negotiators, but it was met by violent opposition on the part of the Company. It was discussed most of the morning of the first day without any approach to an agreement. At that time it was tabled to see if the conferees could make progress on other provisions. It was not taken up again until the end of the second day, when it was finally agreed to as a part of the general settlement involving wages, which had been the other main point of disagreement.[26] At the Company's insistence the language proposed by the I.O.E. was modified so as expressly to permit any employee to be a member of any other labor organization.[27] The Company yielded grudgingly, however, and when negotiations for a renewal contract were

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[25]"The Employer agrees to accept a written order signed by any member of the Employee Organization authorizing the Employer to deduct from that member's wages the amount therein specified and to pay to the Employee Organization said amount less the Employer's cost of making such deduction. Any such order may be revoked at any time by notice in writing given by the employee to the Employer."

[26]R. 260, 264-5, 299-300, 324, 358-9, 460-61, 875-6 and 878.

[27]"During the term of this agreement, the Employer hereby agrees not to retain in its employment for a period of more than ninety days after the date of this agreement any employee eligible for membership in the Employee Organization, unless such employee is a member of the Employee Organization. The Employee Organization agrees to furnish to the Employer within five days after the signing of this agreement a complete list of all members of the Employee Organization and thereafter to keep said membership roll so furnished to the Employer currently up to date.

"Nothing contained in this agreement shall prevent or in any wise affect the right of any employee to join or remain a member of any other labor organization." (R. 827-8)

begun a year later, "one of the first demands the company made, was the abolition of the closed shop" (R. 461). The negotiators who successfully pressed this demand upon the Company represented 90% of the non-supervisory employees; that is, that proportion of the employees had signed membership cards in the I.O.E. (R. 843), thus assenting to the I.O.E. by-laws which provided for a mandatory checkoff (R. 855), before the negotiations began (R. 655-6).

(ii) The Company made deductions from wages only in accordance with assignments to that effect (R. 843) executed by every individual employee. 90% of the employees had signed these assignments before the negotiations for the I.O.E. contract began (R. 655-6). There is no evidence, nor is there any finding, that any of these were executed involuntarily. As this Court said in *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U. S. 197, 238:

> "To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption."

(iii) There is no evidence, nor is there any finding, nor has there ever been any claim that any employee ever revoked his assignment of wages or sought to do so or made demand in any way that the checkoff as to him be discontinued.

(iv) There is no evidence, nor is there any finding, nor has there ever been any claim, that the Company in any way interfered with the independent management

> of the I.O.E. after the moment of its organization. On the contrary, the evidence puts it beyond the reach of reasonable question that the I.O.E. was at all times managed by the men themselves for the active realization of their own wishes, so the men had the entire choice whether the checkoff was to be continued and if so, in what amount. The original I.O.E. contract of August 5, 1937, by which the checkoff and the closed shop were agreed on (but which nowhere specified the amount to be deducted, that being left to the assignments themselves) could be terminated by either party at the end of any annual period (R. 838); supplemental agreements were in fact executed on June 14, 1939, May 8, 1940 and May 23, 1941.[28] Any of these amendments might have eliminated the checkoff and the closed shop. The I.O.E. by-laws, by which the amount of dues was determined and the checkoff made mandatory, could be amended by a two-thirds vote of the General Committee at any two consecutive regular meetings (R. 855). An amendment at any time might have made the checkoff optional for each individual or reduced the amount of dues to any desired figure.

So there is no basis in the evidence for any inference that the checkoff did not express free assent on the part of the men. There is no basis in the Act for any rule of law that unwillingness on their part is to be conclusively presumed. The payments therefore were voluntary and could not involve any injury.

(3) Even if any payment of dues should, as to any of the employees, be deemed involuntary, nevertheless there would be an offset to the extent of the benefit received:

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[28]Certified Supplemental Record, Vol. II, p. 13 (id. pp. 6 and 14).

(i) As noted above, the employees had uninhibited management of the I.O.E., so they had, among other things, entire charge of all expenditures. It was entirely competent for them to discontinue their lease of quarters, discharge secretary and counsel and refrain from any other activities that would involve expense. If they chose to continue the rent of quarters, the maintenance of a secretarial organization and the retainer of counsel and, in a word, their active, purposeful undertaking, they received the full benefit of these expenditures. In the course of the negotiations conducted by the I.O.E., the employees obtained large wage increases, overtime, vacation with pay and collective machinery for the adjustment of grievances, including arbitration. If the Board's equivocal finding that by the closed shop and checkoff "the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I.O.E." (S.R. 55) means a *net loss,* rather than a loss-and-deprivation-of-wages, there is no evidence to support it, there is irresistible evidence against it, and the Act does not authorize any conclusive presumption to that effect. While it may be true "that the Act proceeds upon the theory that the maintenance of a company dominated union is not a benefit but a detriment to the employees who are members of it," as the majority of the court below believed (S.R. 75), the main point of policy is missed by their language of private contract; for injury to the public by interference with free exercise of the right to self organization is quite compatible with a private benefit to the individual employees from wage increases. Congress has not said that a dominated union is an individual "detriment to the employees," still less has it said that such detriment

can outweigh advantages so obtained or, for that matter, have any measurable degree. As Judge Learned Hand said for the Circuit Court of Appeals for the Second Circuit, in *Western Union Telegraph Co.* v. *N.L.R.B.*, 1940, CCA 2, 113 F. 2d 992:

> "It by no means inevitably follows, because an employer has so conducted himself towards a union as to disqualify it from acting as a collective bargaining agent for all his employees, that he has inflicted pecuniary damage upon each member of that union." (997)
>
> . . . . .
>
> "Even though it be true that each employee was denied a right secured by the statute to him personally; i. e. the right to bargain collectively through an untrammelled agent; the measure of his damages for that wrong is not the fees which he paid to the Association." (997-8)

(ii) It is wholly indeterminable, and not even the Board has sought to determine, whether any arrangement other than the I.O.E. would have been made by the employees at the time in question or whether any such other arrangement, even if made, would have yielded any greater benefits. It is, in other words, impossible to show that the employees would have benefitted in any degree by having no union or by having any union other than the I.O.E. *A fortiori* it is impossible to show that they would have benefitted by any alternative in the amount of the checked off dues.

(iii) Clearly, therefore, there is no ascertainable injury to any individual and even if there were, it would be due to the action of the employees themselves (a point noted more fully below) and not of the employer. But even if there were an injury and even if it were in

any degree due to any action of the employer, still it would be due not to the checkoff, which is the gravamen of the complaint here, but to the closed shop clause which compels membership. So to that we may now turn.

(b) The Closed Shop

The closed shop clause is expressly sanctioned by the Act in the case of an independent union (Section 8(3)), but the Act does not proscribe the closed shop clause for a dominated union specifically, or attach to it any special consequences. The closed shop clause, like the checkoff, is merely one of the countless possible ways in which help may be given. The extent of the help is a function of the attitude of the employees, varying inversely with the energy of their allegiance. The public wrong itself, *i.e.*, interference with free exercise of the right to self-organization, is not occasioned solely by the closed shop clause nor is it to be measured by it and the Congress has not indeed contemplated that it would be measured in money at all. Here also, as in the case of the checkoff, it is indeterminable that any actual injury to any individual is involved, for

(1) Communication of an employer's wishes does not have to be made by the formal terms of a written agreement in order to be effective. Understanding of the employer's wishes can be equally potent no matter how subtle may be the divination of those wishes. Thus, *In the Matter of West Kentucky Coal Co. and United Mine Workers of America, Dist. 23*, 1938, 10 N.L.R.B. 88, the contract with a dominated union did not provide a closed shop but:

> "Practically all employees of the respondent are members of the E. M. B. A. because it has been

> understood clearly by all of them that such membership is a prerequisite to permanent employment with the respondent."[29] (96)

Covert preferences by the employer may thus be quite as effective as a proclamation of a closed shop and there is no way of drawing the line between degrees of preference or degrees of manifestation. There is accordingly, for the present point, no difference between this case and the minimum conceivable case of a dominated union. Reimbursement can be justified here only if the Board may require reimbursement in any case of a dominated union, even in the absence of a closed shop clause and even where dues are paid directly to a union without the intervention of a checkoff.

(2) It is indeterminable that any employee became or remained a member of the I.O.E. unwillingly. On the contrary:

> (i) As noted above, the closed shop clause was forced upon the Company over its strong objection by intransigeant representatives speaking for 90% of the non-supervisory employees, all of whom desired a closed shop clause and assented to it in writing before the Company agreed (see 4(a)(2)(i) above).
>
> (ii) There is no evidence that any employee sought to resign, or wished to resign, from the I.O.E.

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[29]The written contract provided a checkoff. The Board, in ordering disestablishment, required dues reimbursement, and the latter requirement was set aside in *N.L.R.B.* v. *West Kentucky Coal Co.*, 1940, CCA 6, 116 F. 2d 816.

(iii) The employees had the entire power of decision whether to continue the closed shop clause. The Company's opposition was notorious and the employees, speaking through the channels of the I.O.E., could eliminate that clause, legally at the expiration of any annual period after the original agreement, or practically, it is obvious, at any moment, even though during any annual period.

So there is no evidence or finding, and it is impossible to determine, how many men, if any, would have resigned from the I.O.E. except for the closed shop, *i.e.*, how many, if any, were actually coerced by it.

(3) There is no evidence or finding, and it is impossible to determine, whether the employees would have gained or lost by any other possible state of affairs, whether by the absence of any union or the substitution of some other union for the I.O.E.

(c) Conclusion

The difficulties encountered in seeking to identify and measure any private injury sustained by the maintenance of a dominated union are a natural consequence of attempting to require private awards under legislation concerned only with the freedom of organization and collective bargaining. Quite aside from the question of the location of responsibility for any injury (discussed below), it is impossible to show that membership or payment of dues was involuntary or unprofitable, and no basis exists on which any finding of injury can be made compatibly with traditional standards of fairness, which are relevant in the interpretation of the Act (*Phelps-Dodge Corp.* v. *N.L.R.B.*, 1941, 313 U. S. 177, 198). In one situation alone the Con-

gress has provided for a money award, namely, back pay in the case of a discriminatory discharge, because the assurance of immunity from loss of pay is, like a similar assurance as to the job, essential for actual independence of action on the part of the employee as to organizational matters. But that is not the case with dues paid to an organization later found to have been dominated. At the moment of choice by the employee, his actual independence will be in no way advanced by knowledge that upon such finding, all paid dues will be returned, nor is there any basis for an administrative finding to that effect. The public wrong proscribed by the Act is wholly terminated by performance of an order of disestablishment, and the injunction enforcing that order effectuates the policies of the Act in full by securing actual and absolute freedom of self-organization. To go further is to impose a penalty, which is outside the power of the Board. And that indeed is just what the Board's position here logically means, that it has the power in all cases of a dominated union, with or without the closed shop clause, and whether the dues are checked-off or paid directly, to impose a penalty because of a past violation of the Act although that penalty is powerless to remedy the evil.

5. Causation

Some of the factors dealt with in the argument above clearly raise a bar under the doctrine of proximate causation to the dues reimbursement order. As shown above, there is no evidence or finding, and there has never been any contention, that the Company at any time intruded into the realm of management of the I.O.E. or that the I.O.E. has at any moment since its organization been managed otherwise than by the men themselves in the independent assertion of their own interests as they saw them. The only unfair

labor practice found or charged against the Company was an expression of employer preference as among alternative forms of organization made in the period of choice, and of assistance to the I.O.E. during the period of choice by use of Company premises, etc., and thereafter by the closed shop and checkoff clauses in the I.O.E. Agreement. The maximum scope of that finding, however, leaves the will of the men as the free agent determining what the I.O.E. did during the five years of its existence.

Surely an expression by the management in 1937 of preference as among organizational forms can not in law be considered the proximate cause of the amount, collection or disbursement of dues by the men themselves during that year, still less so in any of the five succeeding years. No administrative finding can obscure the supervening cause embodied in the active exercise of the will of the employees themselves. They, after all, were:

(i) free to abolish the closed shop at any time;

(ii) free to abolish the checkoff at any time;

(iii) free to abolish dues at any time, or to reduce or increase their amount;

(iv) free to refrain at any time from any further expenditures; and

(v) free to determine from time to time what expenditures were to be incurred.

These concepts of causation are long tested methods of the common law for imposing responsibility in the event of private loss and the Congress must be understood (if it had in mind at all the subject of private injury, which is denied) as legislating harmoniously with traditions of such fundamental bearing unless it expresses some different intention.

Their weight in situations like that at bar is increased by two other factors of long appeal to courts of equity, which have been given weight by other Circuit Courts of Appeal, namely, (1) that the employer paid out the checked off sums to other persons, *i.e.*, the union, thus receiving no benefit, or unjust enrichment, from them and (2) the employees, using the funds as they saw fit, derived the whole benefit from them.

6. The Findings of Domination

The foregoing considerations are believed to dispose of the issue. Should it, however, be the view of the Court that the Board may compel dues reimbursement in any case of a dominated union, at least if the dues are paid through a checkoff, then it is respectfully submitted that the Board's findings of domination, interference and support by the Company in respect of the I.O.E. are unsupported by the evidence and should, with the related provisions of the order, be denied effect for the purposes of the dues reimbursement clause, that being the only part of the Board's order now sought to be set aside.

The previous opinion of this Court is believed to hold that the words of the two management communications, the bulletin of April 26 and the address of May 24, fully informed the men of their absolute organizational freedom. That being so, a basic premise of the case has been settled adversely to the Board's decisions. The only new incidents advanced in the present decision are, as shown in the outline of the facts above, insubstantial. The elaboration in the Board's present presentation of the bulletin and the address contains no element of fact from which any meaning may reasonably be inferred contrary to the plain message of the words themselves. The Board's own decision, therefore, is proof that the case contains nothing significant not already

presented in its 1940 decision which this Court deemed unsuitable for enforcement.

The dues reimbursement clause should not, therefore, be sustainable by any of the findings of domination, interference, or support or by the disestablishment order.

SUBMISSION

It is therefore respectfully submitted that paragraph (e) of Section 2 of the Board's order (S.R. 61), requiring dues reimbursement, is beyond the power of the Board and accordingly invalid and that the decree below (S.R. 78), so far as enforcing that requirement, should be reversed.

Respectfully submitted,

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APPENDIX A

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A., Sec. 151, *et seq.*):

* * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8 It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a

condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B

Requirements for the reimbursement of dues collected by means of a checkoff have been considered, aside from the case at bar, in eleven cases by the Circuit Courts of Appeal in five circuits. All of them have set aside such a requirement as being beyond the power of the Board, only one Judge dissenting in one case. Closed shop agreements, or comparable provisions or policies providing for preferential treatment of union members, were involved, as stated below, in all but four of these cases, and in one or more cases in each of the five circuits except the Tenth Circuit.

Second Circuit

Western Union Telegraph Co. v. *N.L.R.B.*, 1940, C.C.A. 2, 113 F. 2d 992, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of The Western Union Telegraph Company—a corporation, and American Communications Association*, 1939, 17 N.L.R.B. 34.

In the union agreement (Section 1) the company undertook "to hereafter prefer for employment those applicants for positions who indicate their willingness to become members of the Association" and agreed not to discharge "any member of the Association from its employment without adequate cause" (see 17 N.L.R.B. 75 and also 53 and 74-79). This preferential policy toward Association members was implemented by supplemental memoranda, e. g., an agreement to reinstate all employees who had been released from service since January 1, 1918 "because of undesirable affiliations" upon submission of evidence that they had joined the Association and relinquished the "undesirable outside affiliation" (see 17 N.L.R.B. at 75). The Board found that "by favoring Association members as to terms and conditions

of employment, the respondent attempted to compel membership in the Association" (see 17 N.L.R.B. at 79). The first of these provisions was noted by the court (see 113 F. 2d at 994).

The reasoning of the court was, in outline, as follows:

1. Liability must be justified on the theory of a tort in compelling employees to contribute dues (997).

2. Any such compulsion would apply equally to those who paid directly to the union without the intervention of a checkoff (997).

3. Proof of individual pecuniary damage is essential and is not to be presumed (997).

4. Employer conduct disqualifying the union as a collective bargaining agent does not in itself involve infliction by the employer of pecuniary damage on the individual members (997).

5. There is no evidence that all the employees who directed the checkoff of their dues did so because of coercion (997).

6. The union "was by no means valueless to" the employees (997).

7. The dues paid to the union are not the measure of damages for the wrongful denial of freedom in collective bargaining (997-8).

8. The necessity for proof of individual damage can not be obviated by "sweeping all into one net, the victims and the unharmed together" (998).

9. The dues reimbursement requirement is punitive rather than remedial (998).

Corning Glass Works v. *N.L.R.B.*, 1941 C.C.A. 2, 118 F. 2d 625, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Corning Glass Works, Macbeth-Evans Division, and Federation of Flat Glass Workers of America*, 1939, 15 N.L.R.B. 598.

The constitution of one of the dominated unions provided, with the assent of the employer, "that in case of permanent reduction of force and subsequent rehiring members of I.M.G.W.U. shall be given preference of employment" (see 15 N.L.R.B. at 604). The by-laws of another provided, with the assent of the employer, "for preference of employment for Shipping and Trucking Union members" and the union agreement provided a preference like the first aforesaid (see 15 N.L.R.B. at 606). The union agreement with a third dominated union also provided a preference like the first aforesaid. The constitution and by-laws of a fourth dominated union provided, with the assent of the employer, "that preference of work shall be given to members of the organization" (see 15 N.L.R.B. at 610). The employer "suggested the insertion of the provision under discussion not only in each of the agreements, but also in the constitutions in which it appears and . . . it did so in order to encourage membership in the respective departmental unions and to discourage membership in other labor organizations" (see 15 N.L.R.B. at 615-16). This provision was noted by the Court in the case of at least one of the dominated unions (see 118 F. 2d at 629).

The case was decided on the authority of the *Western Union Case*, without new reasoning (630).

Sixth Circuit

N.L.R.B. v. *West Kentucky Coal Co.*, 1940, C.C.A. 6, 116 F 2d 816, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of West Kentucky Coal Company and United Mine Workers of America, District No. 23*, 1938, 10 N.L.R.B. 88.

"Practically all employees of the respondent are members of the E.M.B.A. because it has been understood clearly by all of them that such membership is a prerequisite to permanent employment with the respondent" (10 N.L.R.B. at 96). "Membership in the Association is still considered a condition of employment, virtually every employee belonging..." (see 116 F. 2d at 819-20).

The reasoning of the court was, in outline, as follows:

1. The checked off dues were not retained by the employer but were paid over to the union (822-3).

2. Dues reimbursement is not analogous to back pay (822).

3. Under the doctrine of *expressio unius*, back pay is the only money award permitted under the Act (822).

4. The dues reimbursement requirement is punitive rather than remedial (822).

5. There is no proof of injury, either by non-consent on the part of the employees or by absence of countervailing benefit to them (823).

Judge Arant dissented on the following grounds:

(a) The checkoff was, in the circumstances, an unfair labor practice and Judge Arant "can not say the policies of the Act will not be promoted by the requirement".... (820).

(b) Discouragement of checkoffs for dominated unions would effectuate the policies of the Act (820).

(c) Dues reimbursement is analogous to back pay (820-1).

(d) The wrong being public in character, no proof of damages is required (821).

(e) Dues reimbursement would sever economic ties to the dominated union, thus completing its disestablishment and eliminating a bar to free choice in the approaching election ordered by the Board (821). [A representation proceeding was consolidated with the complaint proceeding (818-19), and the Board order ordered an election as well as disestablishment.]

(f) It is for the Board, and not the court, to determine the form of the remedy unless there is abuse of discretion (821).

N.L.R.B. v. *U. S. Truck Co., Inc.*, 1942, C.C.A. 6, 124 F. 2d 887, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of U. S. Truck Company, Incorporated and International Union, United Automobile Workers of America, Local 174*, 1939, 11 N.L.R.B. 706.

"An oral agreement between the Benefit Union and the respondent provided for a closed shop . . ." (see 11 N.L.R.B. at 713).

The reasoning of the court was, in outline, as follows:

1. The checked off dues were not retained by the employer, but were paid over to the union (890).

2. "The statute contains no provision authorizing the Board to make such an order" . . . (890).

3. Dues reimbursement is not analogous to back pay (890).

4. The asserted power is punitive and not corrective (890).

N.L.R.B. v. *Gerity Whitaker Co.*, June 1, 1942, C.C.A. 6, No. 9194, 10 Labor Relations Reporter, 494 (not otherwise reported), *cert. den.* February 15, 1943, 87 L. Ed. 515, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Gerity Whitaker Co., et als*, 1941, 33 N.L.R.B. 393.

The union contract provided for a closed shop (see 33 N.L.R.B. at 410-11).

The case was decided on the authority of the *West Kentucky Coal Case* and the *U. S. Truck Case*, without new reasoning.

Seventh Circuit

N.L.R.B. v. *J. Greenebaum Tanning Co.*, 1940, C.C.A. 7, 110 F. 2d 984, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of J. Greenebaum Tanning Company and National Leather Workers Association, Local No. 43, affiliated with the C.I.O.*, 1939, 11 N.L.R.B. 300.

The union agreement provided for a closed shop (see 11 N.L.R.B. at 310 and 110 F. 2d at 986).

The reasoning of the court was, in outline, as follows:

1. The dues reimbursement requirement can not contribute anything to the effectuation of the policy of the Act (988 and 989).

2. The dues reimbursement requirement "might have a deterrent effect generally in respect to the checkoff practice," but that is not sufficient to support it (988-89).

3. The employer's unfair labor practices did not compel the payment of dues to any greater degree than if they had been paid directly to the union (988).

4. Disestablishment will be a complete remedy and the past help to the union from the checkoff thereupon ceases to be significant (988-9).

5. Dues reimbursement will not diminish any existing financial stake, for the result will only be that "the employees get back the amount of their dues without diminishing the financial resources of the treasury of the Association" (989).

6. Dues reimbursement is not analogous to back pay, for that is definitely authorized by the Act and obviously remedial and necessary to insure the effectuation of the policy of the Act (989).

7. The dues reimbursement requirement is punitive rather than remedial (989).

A. E. Staley Mfg. Co. v. *N.L.R.B.*, 1941, C.C.A. 7, 117 F. 2d 868, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of A. E. Staley Manufacturing Co. and United Grain Processors, Local 21490 (AF of L)*, 1940, 22 N.L.R.B. No. 31.

Apparently there was no closed shop provision.

The case was decided on the authority of the *Greenebaum Case* without new reasoning. The authority of the case is diminished by the fact that the disestablishment order was set aside.

Reliance Mfg. Co. v. *N.L.R.B.*, 1942, C.C.A. 7, 125 F. 2d 311, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Reliance Manufacturing Co. and Amalgamated Clothing Workers of America, et als.*, 1941, 28 N.L.R.B. 1051.

Apparently there was no closed shop provision (thus see 28 N.L.R.B. at 1145 and 1166).

The case was decided (319) on the authority of the *Greenebaum Case*, the *Staley Case*, the *Western Union Case* and the *Continental Oil Case*, without new reasoning.

Eighth Circuit

Kansas City Power & Light Co. v. *N.L.R.B.*, 1940, C.C.A. 8, 111 F. 2d 340, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Kansas City Power & Light Company and International Brotherhood of Electrical Workers, Local Union B-412*, 1939, 12 N.L.R.B. 1414.

The union agreement provided for a closed shop (see 12 N.L.R.B. 1432-33 and see 111 F. 2d at 346).

The reasoning of the court was, in outline, as follows:

1. The proposal for the checkoff "originated with the Association, was opposed by the company and conceded only upon demand of the Association" (348).

2. The dues were fixed and used by the union alone (348).

3. The company did not originate the union but the domination resulted from a prior dominated union "carrying over an influence which might affect the entire freedom of employees to choose their bargaining agent" (348).

4. There is no evidence of objection to checkoff except that some employees preferred, and were permitted, to pay their dues directly (348).

5. In the circumstances, dues reimbursement has "no relation to the effectuation of any policies of the Act" (348).

N.L.R.B. v. *Southwestern Greyhound Lines, Inc.*, 1942, C.C.A. 8, 126 F. 2d 883, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Southwestern Greyhound Lines, Inc. and Brotherhood of Railway Trainmen*, 1940, 22 N.L.R.B. 1.

Apparently there was no closed shop.

The reasoning of the court was, in outline, as follows:

1. The dues reimbursement is punitive and penal and not remedial (887).

2. The dues reimbursement requirement has, in the circumstances, " 'no relation to the effectuation of any policies of the Act' " (887).

3. There was no discrimination by the employer because of the method in which the employees paid their dues (887).

4. The company did not institute or insist upon a checkoff and the employees were free to revoke their assignments of wages and pay their dues directly (887).

5. The basic evil which was entitled to correction was "not the mere manner of the payment of dues, but the fact that an employee should at all feel obligated to belong to an organization . . ." (887).

6. The dues reimbursement requirement has, in the circumstances, no greater validity than a requirement for dues reimbursement in any case of a dominated union, no matter how the dues were collected (887).

Tenth Circuit

N.L.R.B. v. *Continental Oil Co.*, 1941, C.C.A. 10, 121 F. 2d 120, setting aside a dues reimbursement requirement of the Board entered in *In the Matter of Continental Oil Company and Oil Workers International Union, Local No. 231 (C.I.O.)*, 1940, 22 N.L.R.B. No. 9.

Apparently there was no closed shop.

The reasoning of the court was, in outline, as follows:

1. Dues reimbursement is penal and not remedial (125).

2. Dues reimbursement "would in no wise tend to remove the effect of the wrongful conduct . . . That is accomplished wholly and completely by requiring disestablishment . . ." (125).